United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1367

74-1637

To be argued by
MARVIN V. AUSUBEL

ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

FRANCIS J. LANGFORD, individually and as natural guardian of FRANK P. LANGFORD, an infant,

Plaintiff-Appellee,

against

CHRYSLER MOTORS CORP.,

Defendant-Appellant,

and

WOODBRIDGE DODGE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

EMILE Z. BERMAN and A. HAROLD FROST
Attorneys for Defendant-Appellant
77 Water Street
New York, New York 10005

MARVIN V. AUSUBEL,
Of Counsel.

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POINT I

In neither the pre-trial order nor the pleadings did the defendant Chrysler Motors Corp. admit that it was the manufacturer, designer and engineer of the subject motor vehicle.

A review of the pleadings in this case will indicate clearly that at no time did the defendant Chrysler Motors Corp. concede that it was the manufacturer, designer and

engineer of the subject motor vehicle. Quite the contrary, these allegations were denied through the pleadings and there is not a scintilla of evidence in this record to sustain this charge, the burden of proving which remained upon the plaintiff in the first instance, and on the co-defendant Woodbridge Dodge, Inc. in connection with its cross-claim.

The quotation in plaintiff's brief (p. 3), from the pre-trial order signed by Judge Zavatt is totally out of context. Thus, the statement by Judge Zavatt in the pre-trial order indicates that it was the *claim* of the plaintiff that the defendant Chrysler Motors Corp. was the manufacturer of the subject vehicle, and not a concession to this inaccurate assertion. In this connection, the following appears in the minutes:

> "The plaintiff *claims* that on December 3, 1971 at about 10:00 p.m., he was driving his car along Victory Boulevard on Staten Island and that his seven year old son was a passenger sitting in the front seat. That he and the son had attended a church meeting which opened at about 8:00 p.m.
>
> "When the plaintiff was near the intersection of Victory Boulevard and Leroy Street, he *claims* that he heard a snap in the car and the car started to veer to the right. That from that moment on he had no control of the steering of that car. That that car struck an automobile parked on the right side of Victory Boulevard then hit another parked car and a utility pole and a retaining wall.
>
> "The plaintiff is suing Woodbridge, the dealer and Chrysler Motors Corporation, the manufacturer, *claiming* negligence in design and construction and breach of warrant [sic]. Woodbridge is *claiming* against Chrysler Motors, *claiming* that if Woodbridge is held liable to the plaintiff, Chrysler Motors is liable to indemnify it." (emphasis added)

Nowhere in the pre-trial order is there an indication that any of the issues raised by the pleadings were abandoned. On the contrary, the following appears in the pre-trial order:

> "Both defendants disclaim any and all liability for the damage to the car or the damages sustained by the plaintiff's father, suing in behalf of his infant son and on his own behalf. And has asserted, in substance, that any damages or injuries were caused solely by the negligence of the plaintiff father [sic]."

It is totally inaccurate for the plaintiff to state "this claim was raised for the first time in Chrysler's post-trial memorandum". This claim was indeed raised by the pleadings, and in off-the-record discussions at trial, as well as in a "settlement" conference at trial. Indeed, the plaintiff proceeded on the theory that this defendant "or one of its divisions" manufactured the subject vehicle, and by virtue of such a relationship would be liable for a product defect.

This is not a case such as *Fluoro Electric Corp.* v. *Branford Associates,* 489 F.2d 320 (2d Cir. 1973) where there was an attempt made to correct a misnamed party defendant and where, further, the Court found that misnamed party had virtually led the plaintiff into the misnomer error by the manner in which it, the misnamed party, conducted its business. This is a case where the manufacturer was not sued at all and a separate corporation was sued on a theory that even if it were not the manufacturer but was affiliated with it, such relationship would cast it in liability.

Had the proper defendant been sued, it would have demanded a trial by jury which was waived by the defendant Chrysler Motors Corp. solely because it was confident that neither the plaintiff nor the co-defendant could sustain his burden of proof on this threshold issue.

POINT II

The Court's refusal to permit collateral attack on the witness Morfopoulos and its quashing of the subpoena issued by defendant Chrysler Motors Corp. was clearly erroneous in view of its ultimate complete reliance on his testimony in finding liability against defendant Chrysler Motors Corp.

Plaintiff, in his brief (p. 7), makes the following statements:

> "The witness and counsel were antagonists of long standing. . . . The Court's refusal to tolerate a renewal of this vendetta on public time is scarcely a ground for reversal."

These statements as well as the statements contained elsewhere in plaintiff's brief are totally unsupported in the record. The fact is that neither the witness Morfopoulos nor counsel were ever antagonists in any case and there is nothing in the record to indicate that. This was, and is, the very first case that counsel for defendant Chrysler Motors Corp. ever examined the witness Morfopoulos. The same charge "of a vendetta" made at trial by plaintiff's counsel, of defense counsel, which prompted a motion of a mistrial (142a), which is here repeated, is unfair and unsubstantiated. It is particularly prejudicial since Judge Costantino reacted with a similar considerable hostility towards any cross-examination of this witness on the matter of his expertise, qualifications or background to the subject examination (134a, 137a, 138a, 139a, 140a, 141a, 142a, 143a, 144a).

The District Judge frustrated a proper search for the truth by preventing access to the documents subpoenaed, based upon a belated objection. These documents went to

the heart of the witness' qualifications as well as circumstances surrounding the examination of the vehicle in question.

CONCLUSION

The judgment below should be reversed and the complaint and cross-claim against the defendant Chrysler Motors Corp. dismissed.

Respectfully submitted,

EMILE Z. BERMAN and A. HAROLD FROST
Attorneys for Defendant-Appellant
77 Water Street
New York, New York 10005

MARVIN V. AUSUBEL,
Of Counsel.

United States Court of Appeals , for the Second circuit

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

FRANCIS J. LANGFORD, individually and as natural guardian of Frank P. Langford, an infant,

Plaintiff-Appellee,

against

CHRYSLER MOTOR COMPANY

Defendant-Appellant,

and

WOODBRIDGE DODGE, Inc.,

Defendant-Appellee.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Harold Dudash being duly sworn,

deposes and says that he is over the age of years and resides at 2530 young Avenue Bronx, N.Y.

That on the 5th day of September , 19 74 he served the annexed Reply Brief of the Defendant-Appelant upon

Marshall Kaplan,

50 Court Street

Brooklyn, N.Y.

Markhoff Gottldeb

401 Broadway

New York, N.Y.

in this action, by delivering to and leaving with said attorneys

two true copies of the Brief

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 5th

day of September, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4807905
Qualified in Delaware County
Commission Expires March 30, 1975